

# Central Law Journal

The Lawyers' National Weekly

ESTABLISHED 1874

Vol. 100

ST. LOUIS, MO., MARCH 4, 1927

No. 9

## CONTENTS

### ARTICLE

Effect of an Unconstitutional Statute.

By Oliver P. Field..... 145

### EDITORIALS AND COMMENTS

East is East..... 158

The Radio Act..... 158

### RECENT CASES

Removal of Causes—Suit Against Federal Court Receiver as  
Court Officer Under Judicial Code, Sec. 33..... 159

DIGEST OF IMPORTANT DECISIONS..... 160

INDEX TO CURRENT LEGAL PERIODICALS..... 163

Examination for Immigration Inspector..... 159

COPYRIGHT, 1927, BY CENTRAL LAW JOURNAL COMPANY

\$5.00 PER ANNUM

PUBLISHERS

\$1.00 PER NUMBER

CENTRAL LAW JOURNAL COMPANY

ST. LOUIS, MO.

Entered at the Post Office at St. Louis as Second Class Matter under the Act of March 3, 1879.

## **We Will Bind Your Volumes**

of the Central Law Journal in black cloth, leather back and corners, or in law buckram, for \$2.00 per volume, delivered.

Send us the loose numbers of the volume complete, transportation paid.

## **Use a Temporary Binder**

to put the numbers of the Central Law Journal in as soon as received.

For this purpose we offer, at cost, an attractive De Luxe binder—black figured cloth sides, leather back and corners, with "Central Law Journal" in gold lettering on front cover, for \$1.35, delivered.

---

A serviceable board binder, with "Central Law Journal" on back will be sent for \$1.00, delivered.

## **CENTRAL LAW JOURNAL Company**

# **FEDERAL INCOME and ESTATE TAX LAWS**

**Correlated and Annotated**

By **WALTER E. BARTON** and **CARROLL W. BROWNING**  
of the Washington, D. C. Bar

**Third (1926) Edition, One Volume, Buckram Binding, \$15.00 Delivered**

- A great aid in brief making.
- A great time saver in comparing the various Federal Income and Estate Tax Laws.
- A great aid in interpreting these Laws through Annotations.

Here is a remarkably valuable compilation of all of the Federal Income and Estate Tax Laws, with annotations, the Revenue Acts of 1916, 1917, 1918, 1921, 1924 and 1926 being arranged in parallel columns in *pari materia*. The annotations include the decisions of the Federal Courts and the United States Board of Tax Appeals.

"Your work is by far the most valuable in its field. In writing a brief, preparing an argument or opinion on any question relating to the income or estate tax laws, the complete history of all the statutes, in *PARI MATERIA*, which is so essential, is before the writer in a form easy to handle because of the arrangement of similar sections of the various laws in parallel columns. With your book, a comparison of the various acts can be made at a glance, and the drudgery of finding the citations and authorities interpreting them is avoided."—Palmer, Davis & Scott, Attorneys at Law, Washington, D. C.

For Sale by

**CENTRAL LAW JOURNAL COMPANY**

519 WAINWRIGHT BLDG.

ST. LOUIS, MO.

# Central Law Journal

Vol. 100

MARCH 4, 1927

145

## EFFECT OF AN UNCONSTITUTIONAL STATUTE

OLIVER P. FIELD\*

What is the effect upon a statute of a judicial decision that the statute is unconstitutional? What of the acts of persons who have relied on the statute before the decision of unconstitutionality was rendered? The practical effect of the answers which are to be given to these questions may be illustrated by two types of cases which have been before the courts of Indiana or the courts of other states. Suppose in the first place that an officer arrests a person by virtue of authority granted in a statute. The person arrested attacks the constitutionality of the statute. The court decides that the statute is unconstitutional. Then the person who has been arrested brings an action of damages against the officer. Can the officer plead the statute under which he acted, in justification for his act? Suppose in the second place that a municipality floats a bond issue. The statute under which the bonds are issued is assailed in the courts and they decide that it is constitutional. Six months later the state court decides that the statute is unconstitutional, and reverses their former decision. Can the holder of the bonds recover in an action against the city? Does a declaration of unconstitutionality have the effect of repealing a statute or does the statute become inoperative from the time of the decision which declares it unconstitutional, or is the statute to be considered void *ab initio* from the date of the purported enactment of it by the legislature? It is with the answers which the courts have given to these questions and others which have been presented by actual cases that the writer will deal. This paper will consider only those cases involving total unconstitutionality and will not attempt to handle the cases of partial unconstitutionality.<sup>1</sup>

The Supreme Court of Indiana has said that if a statute is unconstitutional it "is no law, and cannot be used to give appellee a right of action against appellant."<sup>2</sup> And again, in passing upon an amendment to a statute which was held to be unconstitutional, the court said in *Carr v. State*,<sup>3</sup>

"An act which violates the Constitution has no power and can, of course, neither build up or tear down. It can neither create new rights nor destroy existing ones. *It is an empty legislative declaration without force or vitality.*"

In accordance with the views expressed above it is held in Indiana that a repealing act which is unconstitutional can have no effect upon the statute sought to be repealed and the previous statute remains the law as though the legislature had not made any attempt to change it.<sup>4</sup> In the very interesting

\*Reprinted by permission, from 1 Indiana Law Jour. p. 1, after revision by the author, who is a member of the Department of Political Science at Indiana University and has devoted much time to the study of legal phenomena involved in that field. His previous publications include *Ex Post Facto* in the Constitution, (1921) 20 Mich. L. Rev. 315; *Presentation of Bills to the Governor*, (1922) 56 Am. L. Rev. 898; *The Constitutional Privileges of Legislators*, (1925) 9 Minn. L. Rev. 442; *The Withdrawal from Service of the Public Utility Companies*, (1925) 35 Yale L. Jour. 169.

(1) On the effect of partial unconstitutionality see 15 R. C. L. secs. 121-133; Note, Ann. Cas. 1916 D. 89; Cooley, *Constitutional Limitations* (5 ed.) 211-216.

(2) *Bedford Quarries v. Rough*, (1907) 168 Ind. 671, 80 N. E. 539, 14 L. R. A. 418.

(3) (1890) 127 Ind. 204, 26 N. E. 778; 11 L. R. A. 370.

(4) *Igoe v. State*, (1860) 14 Ind. 239; *Grubbs v. State*, (1865) 24 Ind. 295. See also *Oolitic Stone Co. of Ind. v. Ridge*, (1900) 169 Ind. 639, 91 N. E. 944.

case of *Johnson v. The Board etc.*,<sup>5</sup> in which a statute was held unconstitutional because it impaired the obligation of contracts, the court was asked to pass upon the question whether fraud had been used in the procurement of the passage of the statute in the legislature. The court refused to pass upon this point because it was clear that if no statute whatever had been passed no question of fraud could have arisen. The statute before the court was unconstitutional. An unconstitutional statute is absolutely void and to be considered as though it had never been passed. Therefore, the court argued, no question of fraud could arise in connection with this statute.

That an unconstitutional statute is to be considered as though it had never been enacted by the legislature is also the view of a number of other courts. For example, the United States Supreme Court has said,<sup>6</sup>

"That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."

And an appellate court of Texas<sup>7</sup> has said that an unconstitutional statute "is of no more force or validity than a piece of blank paper," while the Minnesota court<sup>8</sup> has expressed the same idea by stating that it "is simply a statute in form, is not a law, and under every circumstance or condition lacks the force of law."

In accord with this doctrine that a statute which is declared unconstitutional is void *ab initio* it has been held that a person accused of a crime and convicted under an unconstitutional statute is entitled to a reversal and as a consequence, his freedom.<sup>9</sup> This is true even though the accused pleaded guilty,<sup>10</sup> and even though the defective statute related only to the term of court at which the accused was tried,<sup>11</sup> having no relation to the substantive law under which he was tried. The same rule has been applied to judgments rendered by a court in civil cases.<sup>12</sup> It has also been held that unconstitutional statutes which purported to incorporate<sup>13</sup> or disincorporate<sup>14</sup> municipalities fail entirely

(5) (1894) 140 Ind. 152, 39 N. E. 311.

(6) *Chicago, Indianapolis & Louisville Ry. v. Hackett*, (1912) 228 U. S. 559, 33 S. Ct. 581, 57 L. Ed. 966. See also *Louisiana v. Pillsbury*, (1881) 15 Otto 287, 26 L. Ed. 1090, where the court said in the course of an opinion declaring a state statute unconstitutional because impairing the obligation of contracts, "Legislation of a state thus impairing the obligation of contract made under its authority, is null and void; and the courts in enforcing the contracts will pursue the same course and apply the same remedies as though such invalid legislation had never existed." *Gunn v. Barry*, (1872) 15 Wall. 610, 21 L. Ed. 212; 12 C. J. 800-1.

(7) *Ex parte Bockhorn*, (1911) 62 Tex. Cr. 651, 138 S. W. 706.

(8) *Minn. Sugar Co. v. Iverson*, (1903) 91 Minn. 30, 97 N. W. 451. See also *Finders v. Bodle*, (1899) 58 Neb. 57, 78 N. W. 480; *State of Kans. v. Bankers & Mutual Benefit Assn.*, (1880) 23 Kan. 355; *Bonles v. Ferguson*, (1898) 55 Neb. 565, 76 N. W. 18; *City of Henderson v. Lieber's Exr's*, (1917) 175 Ky. 15, 192 S. W. 830.

(9) *Norwood v. State*, (1924) Miss. 101 So. 366; *Brewer v. State*, (1905) Ala. 39 So. 927; *State v. Greer*, (1921) Fla. 102 So. 739; *Ex parte Siebold*, (1879) 100 U. S. 376, 25 L. Ed. 719; *Candy v. State*, (1909) 162 Ala. 678, 49 So. 801; *McFarlin v. State*, (1909) 123 S. W. 133.

(10) *Norwood v. State*, (1924) Miss. 101 So. 366.

(11) *Ex parte State ex rel. Smith v. Thurman*, (1921) Ala. 88 So. 899.

(12) *Yellow Pine Lmbr. Co. v. Randall*, (1905) 145 Ala. 653, 39 So. 565.

(13) *Campbell v. Bryant*, (1905) 104 Va. 509, 52 S. E. 638. A private corporation alleged to have been formed under a statute which is subsequently declared unconstitutional may nevertheless recover on subscription to its stock, such subscription having been made after the alleged incorporation. *Evansville Co. v. Evansville*, (1860) 15 Ind. 395; *Weinman v. Willinsburg Co.*, (1888) 118 Pa. 192, 12 Atl. 288. For cases holding that corporations alleged to have been formed under unconstitutional statutes may be treated as de facto corporations see *Clark, Corporations* (3ed.) p. 104 note 21. Cases contra will be found on the same page in note 20. The doctrine that a corporation is not subject to collateral attack is applied to cases of corporations attempted to be organized under unconstitutional statutes by some courts and not applied by others. For cases pro and con see *Clark, Corporations*, p. 120, note 75 and p. 121, note 77. The same diversity of opinion is to be found in the cases involving estoppel to question legality of corporate organization. As to the liability of associates in a corporation formed under an unconstitutional statute see *Warren, Cases on Private Corporations*, (2ed.) p. 630 note.

(14) *Ringling v. Hempstead*, (1911) 193 Fed. 660. It should be remarked that in the case of municipal corporations the de facto doctrine is often resorted to. See note in *L. R. A.* (N. S.) 94-107.

to accomplish their purpose and as a result of this the taxes which are paid to the city may be recovered.<sup>15</sup> However, it should be noted that the courts have gone far to defeat the recovery of taxes paid under statutes which prove to be unconstitutional by holding that if the taxes were paid voluntarily they cannot be recovered.<sup>16</sup> If the taxes were paid involuntarily, however, they may be recovered.

An interesting application of this doctrine that an unconstitutional statute is "fatally smitten at its birth"<sup>17</sup> is to be found in those cases where a person seeks to enjoin the threatened enforcement of some state statute which he alleges to be unconstitutional. The defense was often interposed in these cases that this was in effect a suit against the state and therefore within the prohibition of the eleventh amendment to the United States Constitution. The federal courts have held however, that these suits are not prohibited by that amendment and have enjoined the threatened enforcement of the state statutes under proper circumstances.<sup>18</sup> In reaching this result the courts have reasoned that if the statute is unconstitutional it must fall. When the statute falls the defendant officers are left "standing naked, as individuals clothed with no power emanating from the state, and thus viewed and considered alone as individuals assuming to act under the guise of law where no law exists; . . ."<sup>19</sup> And of course it follows in a most satisfactorily logical manner that the person threatening irreparable damage may be restrained in his private capacity.

It must not be imagined from the foregoing statements that all of our courts are in agreement as to the effect of unconstitutionality. Thus far we have examined situations in which there has been no particular conflict amongst the courts as to the effect of unconstitutionality. But so soon as we pass to the other situations which have been presented to the courts involving this point we find the decisions in conflict. The cases thus far have illustrated the view that a statute is absolutely void and never had any legal existence and that consequently any acts done in reliance on such an unconstitutional statute are not protected in any way. Neither the statutes nor acts done under them have any legal sanction under this view.

Take for example the question whether an unconstitutional bounty statute leaves a sufficient moral or equitable obligation on the state to justify the

(15) See note 13. See also *Pearl River County v. Lacey Lmbr. Co.*, (1921) Miss. 86 So. 755; *Board of Highway Commissioners v. Bloomington*, (1912) 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913 A 471; *State v. Several Parcels of Land*, (1907) 78 Neb. 703, 111 N. W. 602 (Enjoining tax). In *Dennison Mfg. v. Wright*, (1923) Ga., 120 S. E. 120, the court held that the taxes could be recovered from the collector when they were paid under protest, because the protest was said to constitute notice to the collector that he pays away the taxes at his own peril, for he knows they will be contested. The collector is given this consolation, "Besides, should there be any recovery against the defendant, the legislature should and doubtless will, reimburse the defendant, as the state has received the money raised by the exaction of this tax." Several cases are reviewed in the course of the opinion.

(16) See *Tuttle v. Everett*, (1875) 57 Miss. 27, 24 Am. Rep. 622; *Detroit v. Martin*, (1876) 34 Mich. 170, 22 Am. Rep. 512, for an example of payment to prevent sale of land, held voluntary. See *Cooley, Taxation* (3ed.) p. 1496, note 1, and p. 1495. Bonds issued by a municipality under an unconstitutional statute have been held void even in the hands of an innocent purchaser. *State v. Breckler*, (1925) Wis. 202 N. W. 144. It has been said that an assessment levied under an unconstitutional statute does not create even an "apparent lien" and therefore no cloud on the title. *Heywood v. City of Buffalo*, (1856) 14 N. Y. 534.

(17) *Ex parte Bockhorn*, (1911) 62 Tex. Cr. 651, 138 S. W. 706.

(18) *Ex parte Young*, (1907) 209 U. S. 123, 38 S. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 952; *Philadelphia Co. v. Stimson*, (1912) 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570; *West. Union Telg. Co. v. Myatt*, (1899) 98 Fed. 355. See 43 Am. L. Rev. 770 on the origin of the so-called "stripping doctrine." See also *Saratoga, etc., Corp. v. Pratt*, (1920) N. Y. 125 N. E. 834.

(19) *Kans. Natural Gas Co. v. Haskell*, (1909) 172 Fed. 555.



appropriation of public moneys which have been raised by taxation. Some courts have held that such an appropriation is constitutional when the object of it is to recompense officers or private individuals who have suffered because of the statute.<sup>20</sup> Other courts have refused to uphold such an appropriation because they insist that no moral obligation can be raised by an unconstitutional statute.<sup>21</sup> The Louisiana court has decided that an unconstitutional statute cannot create a natural or conscience obligation under the provision of the Code governing those obligations.<sup>22</sup> On the other hand it was held in Arkansas recently that the fact that work was done under an unconstitutional statute does not prevent recovery from a road district on *quantum meruit*.<sup>23</sup>

Another point on which the courts are in conflict is the effect of an unconstitutional statute which purports to create a public office. In the leading case on this subject, *Norton v. Shelby County*,<sup>24</sup> Justice Field said,

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

While this probably represents the weight of authority on this point of law, there is nevertheless considerable authority which holds to the contrary. In Kentucky it has been held that a judge appointed under an unconstitutional statute is a *de facto* officer and that his acts are valid until the unconstitutionality of the statute has been declared.<sup>25</sup> And in a Maine case a special attorney who was appointed for the state under an unconstitutional statute was held to be a *de jure* officer and his acts were to be treated as valid because they were said to have been done with color of authority.<sup>26</sup> In the course of the opinion in the last cited case the court quoted with approval the following statement from *Lang v. the Mayor*,<sup>27</sup> which is perhaps the leading case in opposition to *Norton v. Shelby County* referred to above,

"Every law of the Legislature, however repugnant to the Constitution, has not only the appearance and semblance of authority, but the force of law."

Here we have set forth a doctrine that a statute which is declared unconstitutional is inoperative only from the time of the decision and not from the time of its purported enactment. This view is of course opposed to the views expressed by the Indiana court in the cases cited in the first paragraph of this paper.

There is perhaps no instance where these two views come into clearer relief or sharper conflict than in the type of case of which the famous Indiana case of *Sumner v. Beeler*<sup>28</sup> is an illustration. In the case of *Sumner v. Beeler* the

(20) *U. S. v. Realty Co.*, (1896) 163 U. S. 427; *Miller v. Dunn*, (1887) 72 Cal. 462, 14 P. 27, 1 A. S. R. 67.

(21) *Mich. Sugar Ref. Co. v. Auditor Genl.*, (1900) 124 Mich. 674, 83 N. W. 625, 56 L. R. A. 329, 83 A. S. R. 359; *Minn. Sugar Co. v. Iverson*, (1903) 91 Minn. 30, 97 N. W. 454, criticizing *U. S. v. Realty Co.* cited in note 20.

(22) *Factors and Traders Ins. Co. v. City of New Orleans*, (1873) 25 La. Ann. 454.

(23) *Road Improvement Dist. No. B v. Burkett*, (1924) Ark. 260 S. W. 718.

(24) (1886) 118 U. S. 425, 6 S. Ct. 1121, 30 L. Ed. 178. On this question see note 8 Mich. L. Rev. 299; 15 L. R. A. (N. S.) 94; *Mechem, Public Officers*, sec. 324 note 3, and sec. 326. It seems that the distinction which is drawn in some of these cases is that in the case of municipalities the corporation is not created by the unconstitutional statute, but that its status or creation may not be challenged except by the state. See also *Van Slyke v. Trempealeau*, etc., *Ins. Co.*, (1876) 39 Wis. 390, 20 Am. Rep. 50 and note.

(25) *Nagel v. Bosworth*, (1912) 198 Ky. 897, 147 S. W. 940.

(26) *State v. Poulin*, (1909) 105 Me. 224, 74 A. 119.

(27) *Lang v. Mayor of Bayonne*, (1907) 74 N. J. L. 455, 68 A. 90, 15 L. R. A. (N. S.) 94.

(28) (1875) 50 Ind. 341.

plaintiff had been arrested under a statute which the court decided to be unconstitutional. It is not possible to tell for a certainty whether the arrest had been made before the statute had been declared unconstitutional or not, but the court seems to assume that it was, and writers have assumed that such was the case.<sup>29</sup> The defendant officer was held liable in an action for damages. In the course of its opinion the court said,

"All persons are presumed to know the law, and if they act under an unconstitutional enactment of the legislature, they do so at their own peril, and must take the consequences."

Two cases from other jurisdictions in which there was no doubt but what the acts complained of were committed before the statute was declared unconstitutional will serve to further illustrate the application of the doctrine of the Beeler case. In *Campbell v. Sherman*,<sup>30</sup> the Wisconsin court was asked to pass upon these facts. The defendant sheriff (acting through a deputy) seized a steamboat belonging to the plaintiff under a writ from the Circuit Court of the state for the purpose of enforcing a maritime lien. The steamboat was destroyed by fire. The statute which authorized the issuance of the writ was declared unconstitutional. In an action for unlawful seizure and conversion the sheriff set up as a defense the statute which had been relied on in the proceedings. The officer was held not to have any defense. In the Massachusetts case of *Kelly v. Bemis*,<sup>31</sup> a Justice of the Peace issued a *mittimus* under a statute which was later held unconstitutional. The Justice of the Peace was held liable in an action in trespass.

In an Iowa case<sup>32</sup> however, the court held that in such a situation as that involved in the Massachusetts case last mentioned the Justice of the Peace was not liable for a mistake in judgment as to the constitutionality of a statute. And in the Washington case of *Shafford v. Brown*,<sup>33</sup> a fruit inspector destroyed apples under the authority of an unconstitutional statute. He was held not liable in a subsequent action by the owner of the apples. In accordance with the two views set forth above regarding the liability of officers there are two lines of cases on the liability of individuals for their acts in aiding an officer who acts under an unconstitutional statute.<sup>34</sup>

But an officer who acts under an unconstitutional statute is not criminally liable.<sup>35</sup> And this decision is not rested upon the lack of criminal intent, but rather upon the effect of unconstitutionality. A private person seems, how-

(29) See note 64 Am. Dec. 51, *Cooley, Constitutional Limitations*, (5ed.) p. 224.

(30) (1874) 35 Wis. 103.

(31) (1855) 4 Gray 83, Am. Dec. 50.

(32) *Henke v. McCord*, (1880) 55 Ia. 378, 7 N. W. 623.

(33) (1908) 49 Wash. 307, 95 P. 270.

(34) See *Cartwright v. Canode*, (1914) 106 Tex. 502, 171 S. W. 157, holding they are liable. But see *Dexter v. Alfred*, (1892) 64 Hun. 36, 19 N. Y. S. 770, where the court said, "It is true that, as a general rule, ignorance of law cannot be urged as an excuse for a wrong, but we think in this case that it was competent for the defendant to set up, as a defense or partial defense to this action, the acts of the commissioner under this statute and that the acts done by the defendant were done under the direction or orders of the commissioner." It has been held that a person who takes land under a statute granting him the power of eminent domain is liable in an action for trespass if the statute turned out to be unconstitutional. *Titus v. Poland*, (1923) Pa. 119 A. 540. Of course a person who commits an act in reliance on the statute when that statute has previously been held invalid is subject to suit, as where hogs are impounded under a statute which had been declared unconstitutional. *Nass v. Maxwell*, (1895) 32 S. W. 561.

(35) *State v. Goodwin*, (1898) 123 N. C. 697.

ever, to have been held liable in a criminal action for acts committed under an unconstitutional statute <sup>36</sup>.

One of the reasons assigned by the courts who hold the officer civilly liable in these officer cases is that noted in connection with *Sumner v. Beeler*, that everybody is presumed to know the law. A query might be raised whether this maxim refers to a knowledge of the rules of law or whether it also extends to a knowledge of what the courts are going to decide. One may know the rules of law very well but still guess wrong on the question of whether a court was going to hold a particular statute constitutional or unconstitutional. In other words, does the term "law" as used in this maxim include judicial decisions?<sup>37</sup> Another point that is sometimes stressed is that of a writ or statute being *clear* on its face, either clearly valid or clearly invalid. When this test is attempted to be applied to the constitutionality of statutes one is immediately struck with the futility of such a test. When three judges hold it clearly unconstitutional, or *vice versa* does this not seem to be hairsplitting? Another reason sometime advanced in the cases is that the executive and legislative departments of the government are circumscribed by constitutional limitations and that one of the reasons for such limitations is to protect the rights of the individual against just such excesses of authority as are involved in these cases. The feeling that the executive department of the government was the personification of tyranny was still strong in the minds of the people and the courts during the last century and is not yet wholly eradicated. The founders of the state governments put their faith in the legislatures but a century of experience has resulted in a very considerable distrust of them also, as is reflected by the detailed bill of rights and other numerous procedural and financial restrictions imposed upon the legislative department by almost every state constitution. The courts very naturally have come to regard themselves as the guardians of the rights of the people which are in constant danger of being invaded by the legislature or the executive.

The courts which refuse to hold officers civilly liable in the above mentioned situations argue that a statute should be presumed to be constitutional until it is declared to be otherwise. They call attention to the statements made by practically every court to the effect that they will not pass upon the constitutionality of statutes unless it is essential to the disposition of the case in hand and that they will regard the statute as constitutional until its unconstitutionality is demonstrated beyond a reasonable doubt.<sup>38</sup> These courts insist that this so-called presumption should mean something and that not only the judges are to have the benefit of it. After all, does it not seem sound to give private individuals and ministerial officers the benefit of the view that statutes are to be obeyed until they are declared unconstitutional? Is this not especially so when one remembers that hundreds of statutes are declared unconstitutional

(36) *Flaucher v. Camden*, (1893) 56 N. J. L. 244, 28 A. 82. But see *Strong v. Daniel* (1854) 5 Ind. 348.

(37) See for an example of where the rule is not applied so as to include a knowledge of overruling decisions or later decisions, 20 Eng. and Am. Ency. (2ed.) p. 818.

(38) See for example the remark of Collins, J. in *Allison v. Corker*, (1902) 67 N. J. L. 596, 52 A. 362, 60 L. R. A. 564, when he says, "An unconstitutional statute is not merely blank paper. The solemn act of the Legislature is a fact to be reckoned with." See also the opinion of Chief Justice Gummere, in *Lang v. Mayor*, etc., cited in note 27. On the doctrine of reasonable doubt see Cushman, *Constitutional Decisions by a Bare Majority of the Court*, 19 Mich. L. Rev. 771.



because of technical or procedural defects, and not because they violate the rights of individuals. This was the case in *Sumner v. Beeler*, for there the sheriff had not guessed that the title was defective when compared with the body of the statute.<sup>39</sup>

We do not allow private individuals to resist an unconstitutional statute *vi et armis*,<sup>40</sup> and in many states we do not allow ministerial officers to question the statute in defending against *mandamus* proceedings.<sup>41</sup> He is held liable if he acts under a statute which turns out to be unconstitutional, and he is liable if he refuses to act when the statute turns out to be constitutional.<sup>42</sup> One cannot but feel that the officer gets the worst of it whichever way he turns. On the other hand, the judges of the courts of general or appellate jurisdiction are not liable for a mistake in judgment as to the constitutionality of a statute.<sup>43</sup> On the whole, the writer cannot help but feel that the suggestions made by a note writer in this connection are sound when he says, 1. the statute should be presumed to be constitutional, 2. that the statute should be obeyed by individuals and officers till it is declared unconstitutional, 3. that if there is anything in the nature of the office or of personal interest to entitle him to it, the officer should be allowed to question the statute.<sup>44</sup> Should we not cease regarding the legislature with such suspicion and let those persons whose rights are alleged to be violated assert the constitutionality of the statute? So far as the courts are concerned the government now starts the race with a handicap. It is submitted that the cases opposed to *Sumner v. Beeler* embody the sounder rule.

There still remain a number of situations in which the application of the theory that the statute is void *ab initio* should be tested.

1. Suppose a case where the court declares a statute unconstitutional today, and then six months hence reverses this decision and decides that the statute is constitutional. If the void *ab initio* doctrine be applied the first decision would leave a situation similar to that described by the Indiana court, as

(39) See *State v. Young*, (1874) 47 Ind. 150.

(40) See *State v. Skinner*, (1900) La. 86 So. 716. However, in *Cooley, Constitutional Limitations*, (7ed) p. 259, note 2, *Strong v. Daniel*, (1854) 5 Ind. 348, is cited in support of a statement that persons who have refused obedience to an unconstitutional statute are not protected. This was not a criminal case, however, but a case in equity. An injunction was issued in that case to prevent the execution of a judgment on a replevin bond which had been given under an unconstitutional statute.

(41) On this point see note, 47 L. R. A. 512 for a full review of the cases pro and con. See also *Collier, Unconstitutionality as a Defense to Mandamus Against Public Officer Refusing to Enforce Said Statute*, 72 Cent. L. J. 301 criticizing several cases denying such defense. See also note, 64 Am. Dec. 51. On personal interest of the officer, see *Braxton County Ct. v. W. Va.*, (1908) 208 U. S. 192, 28 S. Ct. 275, 52 L. Ed. 450. In *Bd. of Liquidation v. McComb*, (1875) 92 U. S. 531, 23 L. Ed. 623, the United States Supreme Court said, "In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void." And again, in *Huntington v. Worthen*, (1886) 120 U. S. 93, 30 L. Ed. 558, the court said, in discussing a complaint that the board of assessment commissioners had not complied with a statute which was claimed to be unconstitutional, "When, therefore, under the advice of the Attorney-General, the board or railroad commissioners treated as invalid the direction of the statute . . . it obeyed the Constitution rather than the Legislature. It may not be a wise thing, as a rule, for subordinate executive and ministerial officers to undertake to pass upon the constitutionality of legislation prescribing their duties, and to disregard it if in their judgment it is invalid . . . but still the determination of the legal tribunals can alone settle the legality of their action." The court warns also, that inconvenience to the public and risk to themselves might result if officers were to set themselves up as judges of the validity of the statute.

(42) *Clark v. Miller*, (1874) 54 N. Y. 528.

(43) On the topic of liability in general as applied to judicial officers, see *Biddle, Liability of Officers Acting in a Judicial Capacity*, 15 Am. L. Rev. 427, 492, reviewing fully the English and earlier American cases; Note, 14 L. R. A. 138. See also note, 64 Am. Dec. 61. See also *Burdick, Torts*, (3ed.) 35; *Burdick, Law of the American Constitution*, 123.

(44) See note 64 Am. Dec. 51. See also note in 19 H. L. R. 352 which upholds the view of the cases opposed to the *Beeler* case.

though no statute had been passed. The first question that arises then is how does it happen that there is any statute for the court to consider in the second case? The second point which presents itself is what happens to the statute under the second decision if it be regarded as still on the statute books after the first decision. All courts seem to agree that the void statute (if such a contradiction be permitted) is resurrected and is effective as from the date of its enactment.<sup>45</sup> The purported enactment which was said to have been fatally smitten at its birth by the constitution has by some legal hocus pocus been cured of its congenital disease. This is also the Indiana rule.<sup>46</sup>

2. Suppose on the other hand a case in which a statute is declared to be constitutional today. Six months hence it is held to be unconstitutional. If the doctrine of void *ab initio* be applied the statute should be rendered inoperative from the date of its attempted passage by the legislature. But let us suppose in addition in this case that a municipality had floated a bond issue which had been sustained by the first decision. In handling this sort of a situation the federal courts have held that the statute is to be regarded as constitutional so long as the decision sustaining the statute was in force. Rights which have vested in reliance thereon may not be divested by the second decision.<sup>47</sup> The second decision renders the statute inoperative only from the date of that decision. At this point one wonders whether the Indiana court really meant what it said when it propounded the theory that in these cases of constitutional or unconstitutional statutes the court had nothing to do with the invalidating of the statute but merely expounded a fact which had always existed, namely, that the statute was contrary to the constitution.<sup>48</sup> As indicated above, the Indiana court itself has changed its mind as to the meaning of at least one article of the constitution. To state the process in that way is stating it too simply. As pointed out so ably by another,<sup>49</sup> the process of construction and interpretation are much more complicated than is indicated by the statement of the court alluded to above.

3. Suppose a state statute is declared to be contrary to the Constitution of the United States. Then by subsequent action of congress the states are allowed to

(45) Black, *Constitutional Law*, p. 75; *Christopher v. Mungen*, (1911) 61 Fla. 513, 55 So. 273. In *State v. O'Neil*, (1910) 147 Ia. 513, 126 N. W. 454, 33 L. R. A. 758, this state of facts was before the court. A statute was declared unconstitutional. X committed an act under it which would have violated it, had it been valid. Then the statute was held constitutional. Held, X not subject to prosecution.

(46) *Pierce v. Pierce*, (1874) 46 Ind. 86. This case perhaps loses some of its force, however, because the statute which was involved in *Langton v. Applegate*, (1854) 5 Ind. 327 was not the same statute involved in *Greencastle So. Turnpike Co. v. State*, (1867) 28 Ind. 382. The *Greencastle* case reversed the *Langton* case, but the statutes before the court were not the same, although the same provision of the constitution was involved in both cases. The court in the *Pierce* case does not make any distinction on this basis however, and the case is usually understood to announce the same rule as those cases cited in note 45.

(47) *Gelpcke v. Dubuque*, (1864) 1 Wall. 175, 17 L. Ed. 520; *Los Angeles v. Los Angeles Water Co.*, (1899) 177 U. S. 558, 20 S. Ct. 736, 44 L. Ed. 886. These cases are severely criticized by several eminent writers on several grounds. See 1 *Willoughby*, *Constitutional Law*, p. 10, and 2 *Willoughby*, *Ibid.*, p. 922-24. See on this topic generally, *Dodd*, *Impairment of the Obligation of Contract by State Decisions*, 4 Ill. L. Rev. 155, 327.

(48) *Oolitic Stone Co. of Ind. v. Ridge*, (1910) 169 Ind. 639, 31 N. E. 944. See to the same effect *Ex parte Bockhorn*, (1911) 62 Tex. Cr. 651, 138 S. W. 706, where the court says that the decision of unconstitutionality "... was a mere judicial declaration of a pre-existing fact." This probably indicates what is meant by mechanical jurisprudence as that term is used by modern writers.

(49) *Gray*, *The Nature and Sources of the Law*, (2ed.) p. 171. That writer says in this connection, "A judge puts before himself the printed page of the statute book; it is mirrored on the retina of his eye and from this impression he has to reproduce the thought of the law-giving body. The process is far from being merely mechanical; it is obvious how the character of the judge, and the case of his mind must affect the operation, and what a different shape the thought when reproduced in the mind of the judge may have from that which it bore in the mind of the lawgiver. This is true even if the function of the judge be deemed only that of attempting to reproduce in his own mind the thought of the lawgiver . . ."

enter the previously prohibited field. If the statutes of the states on this point were to be considered in force it would seem that they must have been re-enacted. But the courts hold that they are revived without re-enactment by the state legislature.<sup>50</sup> The courts point out that they cannot repeal statutes and that the statutes are not absolutely void, but remain on the statute books.

4. Suppose a statute which has been declared unconstitutional is amended by legislative action so as to cure the defect which was found in it. Will the statute then be in full force and effect? Or suppose it is the provision of the constitution which has been changed so that the statute would not contravene it in its new form. In the answers given to these two questions by the courts there is a conflict of decisions. Those courts who treat the statute as void *ab initio* should naturally hold that subsequent statutory or constitutional changes cannot cure the defective statute. But they do not always seem to be consistent in this, and the cases divide into several illogical groups on these questions.<sup>51</sup>

5. Let us consider two cases in the law of crimes. First, let us suppose that a person is convicted under an unconstitutional statute. We have noted previously that the usual result in such a case is to free the accused person. Now let us suppose that an indictment were brought against this person under a statute which is constitutional. He sets up in defense his prior indictment and trial under the unconstitutional statute. It has been held that if he acquiesced in the first trial he may not be tried again, under the prohibition of double jeopardy.<sup>52</sup> In the second place let us suppose that an insane person is committed under an unconstitutional statute. Is he set free when the unconstitutionality of the statute is determined? He is not.<sup>53</sup> But is there really much more reason why an insane person should be restrained of his liberty under an unconstitutional statute than a murderer who pleads guilty? The latter escapes, but the former does not. Should not both of them be placed in such a position that they are no longer able to threaten the community? But the prize winning case in the realm of criminal law seems to the writer to be that of *In re Medley*,<sup>54</sup> wherein the prisoner was set free because a state statute which was declared to be unconstitutional because *ex post facto* was held to have repealed the previous state statute which had covered the subject. Here certainly is a repudiation of the void *ab initio* and *in toto* theory with a vengeance.

From the above review of the cases involving the effect of unconstitutionality it will be seen that the courts usually choose one of two alternatives. They may follow strictly the view that an unconstitutional statute is void *ab initio* and refuse to recognize the validity of any acts done in reliance on the statute.

(50) This seem to be the effect of *In re Rahrer*, (1891) 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 5727. See also *Commonwealth v. Calhane*, (1891) 154 Mass. 115, 27 N. E. 881; *Stajar v. Dickinson*, (1918) Ia. 169 N. W. 756; *McCollum v. McConaughy*, (1909) 141 Ia. 172, 119 N. W. 539.

(51) See *Ex parte Bockhorn*, (1911) 62 Tex. Cr. 651, 138 S. W. 706; *State v. Tuffley*, (1890) 20 Nev. 427, 19 A. S. R. 374. Contra, *State v. City of Cincinnati*, (1895) 52 Oh. 419, 40 N. E. 508. See 38 L. R. A. (N. S.) 77-79. See *Ross v. Bd.*, (1905) 128 Ia. 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431. See also note, 60 L. R. A. 564.

(52) *McGinnis v. State* (1848) 9 Humph. (Tenn.) 43, 49 Am. Dec. 697.

(53) *In re Boyett*, (1904) 136 N. C. 415, 48 S. E. 789, 103 A. S. R. 944, 67 L. R. A. 972, 1 Ann. Cas. 729.

(54) (1889) 134 U. S. 160, 10 S. Ct. 384, 33 L. Ed. 835. The court released the prisoner because, " . . . it is apparent that while the statute under which is now held in custody is an *ex post facto* law in regard to his offense, it repeals the former law, under which he might otherwise have been punished . . . ."

This sometimes leads to so-called strong decisions, decisions contrary to sense and justice. Or they may choose to modify the general rule which they may have previously enunciated, or refuse to apply it to a particular situation. There are two views that are discernible in the foregoing cases. One view is that just mentioned, that the statute is as though never passed. The other is that the statute is as though passed, is to be relied upon, and to be regarded as law until the statute is declared unconstitutional. There are some situations where the courts are willing to follow the void *ab initio* doctrine, but they are not so very numerous. There are other situations in which the courts are in conflict whether the statute is to be treated as void from the beginning or not. Then there is another group of situations in which all courts refuse to adhere to the doctrine that the statute is void from the beginning. From this it can be seen that it is impossible to lay down as a general rule that an unconstitutional statute is void, or is to be treated as no law. As a matter of fact there are as many cases or more, and as many situations or more, where the courts hold the statute inoperative only from the date of the decision as there are that hold it void from the beginning.

There is, however, another phase of the subject which is suggested by the group of cases of which *Shephard v. Wheeling*<sup>55</sup> is an example. In that case the court said,

" . . . it does not annul or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognize it, and determines the rights of the parties just as if such statute had no existence. The court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only, and there is no judgment against the statute. The opinion or reasons of the court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute book; it does not repeal . . . the statute. The parties to that suit are concluded by the judgment, but no one else is bound. A new litigant may bring a new suit, based upon the very same statute, and the former decision cannot be pleaded as an estoppel, but can be relied on only as a precedent. This constitutes the reason and basis of the fundamental rule that a court will never pass upon the constitutionality of a statute unless it is absolutely necessary to do so in order to decide the cause before it."

In the opinion of the Indiana court in the case of *Pierce v. Pierce*,<sup>56</sup> previously referred to, the court assumes that in the two previous cases which were discussed the same statute was involved. What actually happened was that in the first case<sup>57</sup> where the statute was declared unconstitutional there was a different statute involved than in the second case<sup>58</sup> where another statute was declared constitutional. The court had before it in these two cases two different statutes, both containing the same defect, and both cases turned upon the construction of the same constitutional provision. The court construed the constitutional provision differently, not the statutes, in these two cases. Then

(55) (1887) 20 W. Va. 479, 4 S. E. 635. See this statement by the New Jersey court in *Allison v. Corker*, (1902) 67 N. J. L. 596, 52 A. 362. "An unconstitutional statute is nevertheless a statute; that is, a legislative act. Such a statute is commonly spoken of as void. I should prefer to call it unenforceable, because in conflict with a paramount law. If properly to be called void, it is only so with reference to claims based upon it." See also *Rutten v. Mayor, etc.*, (1906) 73 N. J. L. 467, 64 A. 573; *Bentley v. State Bd. Medical Examiners*, (1922) Ga. 111 S. E. 379. So a statute may be unconstitutional as to past transactions, but valid as to future ones, *Harlee v. Ward*, (1868) 15 Rich. Law (S. Car.) 231.

(56) (1874) 46 Ind. 86.

(57) *Langton v. Applegate*, (1854) 5 Ind. 327.

(58) *Greencastle So. Turnpike Co. v. State*, (1867) 28 Ind. 382.

in the *Pierce* case the court says that the rule is that where a statute which has been held unconstitutional is subsequently held constitutional, the statute is to be treated as a valid statute from the date of its enactment. This question was not presented by the facts of the case, however. It may be that the court was thinking in terms of the constitutional provision instead of in terms of the statutes involved.

This raises an interesting and somewhat important question. Suppose a statute is declared unconstitutional today. Is every statute on the books which contains that same infirmity to be deemed unconstitutional also? Or does the declaration of unconstitutionality affect only that particular statute which was before the court? There are cases which seem to imply as the *Indiana* case does, that the broader effect is to be given to the decision.<sup>59</sup> When one stops to analyze the decisions and the theories underlying them he is confronted with a considerable task. The usual explanation of the process of declaring statutes unconstitutional is that there is on the one side a body of paramount rules and principles. These are collectively denominated the constitution. Then there is another body of rules which are denominated statutes. It is not so important here whether we regard the constitution and statutes as law or as sources of law.<sup>60</sup> In the decision of a given case the courts must apply a rule. Here are two rules, or sources of rules. The rule found in the constitution must prevail. But the question still remains, what becomes of the other rule? Is it still a rule, only held in abeyance? Or is it entirely abrogated forever, unless the legislature which gave expression to it in the statute shall again express its will in another statute? It is quite clear why statutes are declared unconstitutional in many instances. But it is not so clear why it shall be said that the statute is entirely abrogated by a decision of a court that it is unconstitutional. Perhaps we will need to peer deeper to find the reason which caused the courts in the early cases to hold that the statute was void *ab initio*. Law does not consist only of rules of conduct.<sup>61</sup> But it so happens that it is this phase of the content of the term that we have in the recent past stressed the most. In the minds of many judges is often to be found the outline of an ideal pattern towards which they seek to make the law move. This is as it should be. Constitutional law and constitutional interpretation are often as much affected by the views we entertain on the subject of government as by our ideas of strict law. Is it not only reasonable to expect, therefore, that the judges will be influenced by their ideas of government in the making of decisions in this field? Could the human mind so operate as to exclude it? If there be any truth in this view it may be that

(59) See *Commonwealth v. Calhane*, (1891) 154 Mass. 115, 27 N. E. 881; *Stajar v. Dickinson*, (1918) 141 N. W. 756; *McCollum v. McConaughy*, (1909) 141 Ia. 172, 119 N. W. 539.

(60) Gray, *Nature and Sources of Law*, (2ed.) p. 170, insists that constitutions and statutes are only sources of law. In Pound, *Outlines of Lectures on Jurisprudence*, (3ed.) p. 93, legislation is given as one of the forms of law.

(61) For a convincing demonstration that this is so see Pound, *The Theory of Judicial Decisions*, 36 H. L. R. 641, 802, 940. "These three elements that make up the whole of what we call law are: (1) a number of legal precepts more or less defined, the element to which Bentham referred when he said that law was an aggregate of laws; (2) a body of traditional ideas as legal precepts should be interpreted and applied and causes decided, and a traditional technique of developing and applying legal precepts whereby these precepts are eked out, extended, restricted, and adapted to the exigencies of administration of justice; (3) a body of philosophical, political and ethical ideas as to the end of law, and as to what legal precepts should be in view thereof, held consciously or subconsciously, with reference to which legal precepts and the traditional ideas of application and decision and the traditional technique are continually reshaped and given new content or new application." p. 645. Each of the three articles deals with one of these elements.



here is some light on what caused the early courts to hold that the statute was not only inoperative from the decision, but from the time of purported enactment. The American ideal of government during the past century was and still is that there are three departments of government, each with its own functions and powers. The constitution prescribes the limits of each. Neither of them should overstep these limits. In these cases under review the courts find that the legislature or executive department has overstepped its bounds. In an ideal system they would not do this, and so the judges in the early cases decided to treat these excesses as though they had never happened, because they should not have happened. The problem was viewed and treated as one of legislative power or capacity. This may offer a partial explanation for a rule which seems to be rather ill-suited to modern conditions. It is submitted that the view set forth in the Shephard case,<sup>62</sup> more nearly describes what actually takes place in the majority of situations which the courts meet in this branch of the law than do any of the other explanations offered.

In view of the cases reviewed above is a little surprised to find the doctrine of void *ab initio* stated as the universal and unqualified rule by so eminent an authority as Cooley, in his work on Constitutional Limitations,<sup>63</sup>

"When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made."

That this statement is not in accord with the cases would seem clearly right from the above review of both federal and state cases. It illustrates, however, the persistence with which even eminent text writers will cling to the view that unconstitutional statutes are void *ab initio*.

#### SUMMARY

In summary the rules of law which have been followed by the courts in the cases reviewed in this article might be classified as follows:

I. Situations in which the court adheres to the view that the statute is void *ab initio*.

1. The case of a repealing statute, except in the case of *In re Medley*.
2. An unconstitutional amendment to a statute.
3. Where criminal conviction under an unconstitutional statute is reversed.
4. Judgment in civil suit rendered under an unconstitutional statute or by a court which is established or granted jurisdiction by an unconstitutional statute, except as limited by the *de facto* officer doctrine.
5. Incorporation or disincorporation of a city, except as affected by the *de facto* doctrine.
6. Taxes paid under an unconstitutional statute may be recovered. This doctrine is curtailed in practical operation by the limitations enforced by the courts regarding voluntary payment.

(62) See note 55 and cases.

(63) (7ed.) p. 253 and note 2. Several of the cases cited in this note do not bear out the broad statement quoted above.

7. The so-called *stripping doctrine* under the eleventh amendment to the United States Constitution.
8. Individual liability in criminal action for acts committed under unconstitutional statute.

II. Situations in which the courts are in conflict whether the rule should be that of void *ab initio* or that of void from the date of the declaration of unconstitutionality by the court.

1. Unconstitutional statutes as creating a moral obligation on the government or on individuals.
2. Creation of a public office.
3. Liability of officers in civil suit for acts done in reliance on an unconstitutional statute.
4. Liability of individuals in civil action for acts done in reliance on an unconstitutional statute.
5. Defense of an officer to an action of mandamus to compel him to act under an unconstitutional statute.
6. Curing of the defect of unconstitutionality by a statutory amendment.
7. Curing defect of unconstitutionality by a change in the constitution.
8. The effect of an unconstitutional statute upon the status of private corporations attempted to be organized thereunder.

III. Situations in which the courts refuse to apply the void *ab initio* doctrine and apply the doctrine of void from the time of the declaration of unconstitutionality.

1. Criminal Liability of an officer who has acted under an unconstitutional statute.
2. Reversal of a decision of unconstitutionality.
3. Reversal of a decision of constitutionality with rights acquired in reliance on first decision.
4. Criminal conviction under unconstitutional statute and double jeopardy and the commitment of an insane person under an unconstitutional statute.

IV. There is a fourth group of cases which hold that an unconstitutional statute is not void at all, but that the statute is only inapplicable to the particular situation presented to the court in a given case. The statute may be applicable to other situations and is therefore said to be constitutional as to them.

## EDITORIALS AND COMMENTS

## EAST IS EAST

For fifty years Vermont has adhered to the rule that a person injured by a defect in a highway cannot recover statutory damages therefor if he was traveling in violation of law. The theory is that he is not a "traveler" within the meaning of statute, if his travel violates the law. Therefore persons driving automobiles without the requisite license are "on the highway at their own risk," and cannot recover damages caused by defects therein.

In the recent case of *Hanley v. Town of Poultney*, 135 Atl. 713, the plaintiff was riding as guest in an automobile the owner and driver of which did not have the proper license, but the plaintiff knew nothing of his failure to comply with the law. While the automobile was passing over a highway bridge in the defendant town, the bridge collapsed, precipitating the automobile and its occupants into the stream below, resulting in injuries to plaintiff for which the suit was brought. He recovered judgment in the trial court, and when the case reached the Supreme Court of Vermont that court was for the first time called upon to decide whether the rule applicable to the driver of the unlicensed automobile would also preclude an innocent guest from recovering. In the above cited decision the court held that "the logic" of the prior cases applicable to the drivers also barred recovery by any person riding in the vehicle! In so holding the court followed similar decisions in Massachusetts and Maine.

As remarked in the rhyme on the one-horse shay: "Logic is Logic. That's all I say." But really, isn't requiring the guest to have a license to get hurt carrying the joke a bit too far?

Lobbyettes are urging legislation to enable women to vote without disclosing their age. It's about time somebody started a movement for equal rights for men.

## THE RADIO ACT

On February 23rd the President signed the "Radio Act of 1927" which, by its terms, became effective and in force immediately upon its passage and approval. It provides for government regulation of practically everything pertaining to radio transmission, but is without express reference to radio reception except a provision prohibiting persons from divulging, publishing or making use of certain messages and information received by radio. Of the 41 sections in the Act, the following three are of particular interest:

Sec. 18. If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect; provided that such licensee shall have no power of censorship over the material broadcast under the provisions of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

Sec. 19. All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, firm, company, or corporation, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation.

Sec. 29. Nothing in this act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

The Act contains very drastic provisions against all forms of monopoly in the radio industry.

"An automobile negligently constructed, falls within the same class as poisons, explosives and noxious foods which are by their nature inherently dangerous." *Kramer v. General Motor Truck Co.* (U. S. Dist. Ct. for Ohio, N. Dist. E. Div.; February 1, 1927).

## RECENT CASES

REMOVAL OF CAUSES—SUIT AGAINST  
FEDERAL COURT RECEIVER AS COURT  
OFFICER UNDER JUDICIAL CODE SEC. 33.

*Slover v. Chi. M. & St. P. Ry. Co. et al.*, 16 F. (2d) 609 (Mo. Dist. Ct.), was a suit for damages apparently for injury sustained on the railroad. The suit was instituted in a Missouri state court against the railroad and the receivers operating it, who were appointed by a Federal Court. The receivers sought to remove the case under Sec. 33 of the Judicial Code, as amended in 1916, which among other things provides that:

When any civil suit \* \* \* is commenced \* \* \* against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer \* \* \* the said suit \* \* \* may at any time before the trial or final hearing thereof be removed for trial into the District Court next to be holden in the district where the same is pending upon the petition of such defendant to said District Court.

The court held that the instant suit was not removable under that section and, in part, said:

An examination of the whole of section 33 shows that it was designed to protect revenue officers and court officers against both civil suits and criminal prosecutions "for or on account of any act done under color of his office or in the performance of his duties as such officer."

It will be observed that this language limited the right of removal to such actions as may have been commenced because of an act done under color of office or in the performance of the duties of the office. Apparently the actions covered by the statute were such actions as were designed to hold the officer personally liable because of his official conduct. The Congress therefore extended the protection of the federal court to such officer so that he might not be prejudiced or embarrassed at the trial by local bias or influence. . . .

An examination of the case of *Barnette v. Wells Fargo National Bank*, 270 U. S. 438, 46 S. Ct. 326, 70 L. Ed. 669, does not disclose any pronouncement which differs from the above. In that case suit had been instituted against federal court receivers on the grounds that certain property in the hands of such receivers had been obtained by duress. The removal to the federal court was not challenged before the Supreme Court. The court said: "As the removal is not challenged here, we think the presumption should be indulged that the removal was rightly taken, and that the district court had jurisdiction."

The court, in making its proper inquiry upon the face of the record with respect to its juris-

diction, took occasion to say: "But an examination of the bill, which is set forth in the record, shows that the purpose of the suit was to recover land and funds then in charge of the receiver of a court in Alaska, which was created by laws of Congress and derived its powers and authority from those laws. Such a suit was removable under section 28 of the Judicial Code as supplemented by the amendment of section 33 by the Act of August 23, 1916." It will be noted, therefore, that the court did not rest its jurisdiction solely upon said section 33, but placed the right of removal squarely under section 28 of the Judicial Code (Comp. St. § 1010) "as supplemented by the amendment of section 33."

The bill, as set forth in the opinion of the court, and in *Wells Fargo Nevada Nat. Bank of San Francisco v. Barnette* (C. C. A.) 298 F. 689, 43 A. L. R. 916, yields the interpretation that the receivers, under color of their offices as such, retained property which had been procured by duress practiced by others, and this property the plaintiff sought to recover. In other words, the reference to section 33 was justified under the pleadings. In the instant case, the integrity of the receivers is not involved; neither is any act of theirs under color of their offices challenged.

The case of *Metarazzo v. Hustis*, 256 Fed. 882 (N. Y. Dist. Ct. 1919), holding to the contrary, is cited in the opinion but not discussed.

EXAMINATION FOR IMMIGRATION IN-  
SPECTOR

We are requested to announce that the United States Civil Service Commission will soon hold an examination to select qualified men for employment as immigrant inspectors on the Southwestern Border. Applications for the examination will be received by the Commission until March 26. It will be held only in Arizona, New Mexico and Texas.

The duties of an examiner include the examination of alien arrivals, the investigation of aliens unlawfully in the United States, and the prevention of aliens from entering the country in violation of law. Full information and application blanks may be obtained from the Commission, Washington, D. C., or at the post office or custom house in any of the larger cities of Arizona, New Mexico or Texas.

## DIGEST OF IMPORTANT DECISIONS

The name of the state is printed in bold face type to enable you to select cases from any particular state. The cases from the National Reporter System are copyrighted by the West Publishing Co., St. Paul, Minn., from whom a copy of any such decision may be obtained for 25 cents.

**ALIENS**

Person attempting to enter country through official immigration channels, claiming right to enter because of citizenship, is not entitled to have claim determined by judicial proceedings, but may be denied admission by immigration authorities. *United States ex rel. Jew Lee v. Brough*, 16 F. (2d) 492.

**CANCELLATION OF INSTRUMENTS**

In cases of life insurance, where insured has died and claim has been made on policy, defense to policy on ground of fraud can be made in action at law, precluding suit in equity to cancel policy, which may, however, be maintained, if insured is alive. But insurer under accident and health policy, wherein insured's guardian is claiming monthly indemnity for total disability by reason of insanity, held to have adequate remedy at law, in that special finding of jury on claim for monthly payment would bar actions for later payments, and suit in equity to cancel policy on ground of fraud was thereby not warranted. *Continental Casualty Co. v. Yerxa*, 16 F. (2d) 473.

**CARRIERS**

Payee bank, which credited drawer of drafts with proceeds and indorsed accompanying bills of lading by indorsement guaranteeing prior indorsements, held not a "negotiator" of bill of lading within Bills of Lading Act, § 34; there was no implied warranty, and payee bank, held at most a "pledgee," within Bills of Lading Act, § 36. *American State Bank of Omaha, Neb. v. Mueller Grain Co.*, 15 F. (2d) 899.

**CONSTITUTIONAL LAW**

That police regulations in some instances operate with hardship and seem oppressive does not render regulation invalid or unconstitutional, since in contemplation of law benefits equal burdens. *Hayes v. Hoffman*, 211 N. W. 271, **Wis.**

**CONTEMPT**

Where defendant, without regard for oath he had taken, and without consideration or respect for authority, justice, or dignity of court, gave testimony which he knew was false, he purposely "so demeaned himself as to retard" court proceedings, and was guilty of direct contempt, under Indiana Statute. *Young v. State*, 154 N. E. 478, **Ind.**

**CONTRACTS**

Where a party sues for damages for the breach of a written contract for personal services providing for one cent per pound for all cotton grown upon a place during a named year as compensation, and who, after the contract has been breached, engages in other business, the profits of which are uncertain, he cannot

sue upon such contract until after the expiration of the year, because the damages cannot be ascertained. It is the duty of the agent in such case to reduce his damages as far as reasonably possible, and the amount of such reduction is unknown until the end of the year. *Upton v. Adeock*, 110 So. 774, **Miss.**

**CORPORATIONS**

Where foreign railroad corporation had branch office for soliciting freight and also performed minor acts of business courtesy, not compulsory, such as acting as messenger for shippers requesting re-routing and other occasional and incidental acts, corporation was not doing business within county, within statute, providing that suit may be brought against foreign corporation in county where it has agency or transacts business. *Shambe v. Delaware & H. R. Co.*, 135 Atl. 755, **Pa.**

Though transactions of a foreign corporation may be such as to constitute interstate commerce, yet if any part of that interstate commerce amounts to the transaction of business in the jurisdiction questioned, valid service may be had within the jurisdiction. *Rendleman v. Niagara Sprayer Co.*, 16 F. (2d) 122.

Foreign corporation, which solicited orders through local agents, compensated on commission basis, who transmitted orders to corporation for acceptance or rejection, and who had no authority to settle accounts or receive payments, held sufficiently engaged in business in state to make service of process on local agents service on corporation. *Erikson v. Frink Co.*, 16 F. (2d) 498.

**COVENANTS**

Restrictions imposed on lots forbidding apartment houses on "site" less than 52½ feet in width held to permit building of apartment house by owner of two lots together totaling 52½ feet wide. *Goldstick v. Thomas*, 211 N. W. 666, **Mich.**

Restrictive covenant, requiring building to be not less than 25 feet back from street line, steps, windows, porches, or other usual projections excepted, held violated by dwelling having sun porch, 10 feet wide, extending 7.3 feet beyond building line and supported by main foundation of house. *McCain Realty Co., Inc. v. Aylesworth*, 219 N. Y. Supp. 59.

**CRIMINAL LAW**

In prosecution of member of order of Elks, instruction that if any juror was member of such order his duty, as juror, transcended in importance any obligation he might feel toward defendant by reason of such membership held proper. *People v. Harris*, 251 Pac. 823, **Cal.**



Instruction that if jury believed defendant guilty beyond reasonable doubt they should so find, notwithstanding proof of good general reputation as peaceable and law-abiding citizen, held erroneous, where given without explanation, limitation, or qualification, and where instruction that evidence of good character may generate reasonable doubt was refused. *People v. Harris*, 251 Pac. 823, **Cal.**

#### **DIVORCE**

Presumption that occupancy of room and bed by husband and wife shows condonation is rebuttable, and, when facts appear to contrary, presumption vanishes. *Dennis v. Dennis*, 289 S. W. 16, **Mo.**

In absence of categorical denial of charges in husband's counterclaim, reply denying charges, and statement by wife that she intended in good faith to defend against those charges, wife was not entitled to temporary alimony and counsel fees. *Gronbach v. Gronbach*, 218 N. Y. Supp. 643.

#### **ELECTION OF REMEDIES**

That a party prayed reformation of a written contract on the ground of mistake, and sought to enforce the contract as so modified, which relief was denied on a finding that there was no mistake, held not to constitute an "election of remedies," which precluded it from enforcing the contract as written. *Henderson Tire & Rubber Co. v. Gregory*, 16 F. (2d) 589.

#### **EQUITY**

Claimants under bond for materials and labor furnished contractor in a sum in excess of liability on bond held adverse claimants, within Act. Cong. May 8, 1926 (44 Stat. 416), conferring jurisdiction on federal court, on sureties' bill of interpleader showing claimants are citizens of different states. *Fidelity & Deposit Co. of Maryland v. A. S. Reid & Co.*, 16 F. (2d) 502.

#### **EVIDENCE**

Self-serving letters, not purposefully written, are admissible in evidence on behalf of the writer to prove his intention. *Minton v. Sutton*, 135 Atl. 693, **N. J.**

Physicians' testimony on cross-examination that no one could tell positively whether plaintiff might not have been in his present tubercular condition if he had suffered no physical injury held not to destroy, as matter of law, the effectiveness of their previous declarations that accident was super-inducing cause of such condition; it being for jury to consider evidence of each as whole in passing on weight of judgments expressed. *McMinis v. Philadelphia Rapid Transit Co.*, 135 Atl. 722, **Pa.**

#### **EXPLOSIVES**

In suit for damages for injuries to infant resulting from explosion of dynamite caps alleged to have been left in accessible place by defendant's servants, evidence of other acts of negligence in leaving unexploded dynamite cartridges in stumps held erroneously admitted. *Hereules Power Co. v. Wolf*, 110 So. 842, **Miss.**

#### **FEDERAL COURTS**

Where a state statute provides for a hearing and decision by an administrative body, with right of review in a court, a federal court has jurisdiction of a suit for such review when complainant is a nonresident of the state, the adverse parties are residents, and the requisite amount is involved. *Associated Industrial Ins. Co. v. Ellis*, 16 F. (2d) 464.

#### **INDEMNITY**

Contract whereby contractor agreed to protect owner against claims for injuries to workmen engaged by contractor will not be extended to include acts of owner or his agent, in absence of express provision therefor. *Wallace v. United States*, 16 F. (2d) 309.

#### **INJUNCTION**

Though defendant's building encroached on plaintiff's land to small extent and of value of only \$7, compelling defendant to restore land to its former condition at a cost of \$1,900 held, under facts, not inequitable or oppressive. *Crosby v. Blomerth*, 154 N. E. 763, **Mass.**

Plaintiffs, owners of property which they acquired and improved in accordance with restrictions imposed by a common grantor, held entitled to an injunction restraining defendants from erecting a two-story public garage and store building on lots originally sold subject to the same restrictions as other lots, but later reconveyed to grantor and resold free from such restrictions. *Sullivan v. Playfair Realty Co.*, 211 N. W. 654, **Mich.**

#### **INSURANCE**

Provision invalidating insurance policy unless insured was in sound health at date of issuance held not to preclude recovery for death of one having tuberculosis at date of delivery of policy, nearly a month after medical examination, where it was not shown that no such affliction existed at time of medical examination and making of application. *National Life & Accident Ins. Co. v. Wallace*, 289 S. W. 219, **Ky.**

Where insured, having policy in favor of wife, after instituting suit for divorce, which was not decided before he died, and after various unsuccessful attempts to secure the policy from wife, assigned policy to another, and wrote letter of explanation asking change of beneficiary, held law would consider beneficiary had been changed; insured having done everything in his power to effect change. *New York Life Ins. Co. v. Cook*, 211 N. W. 648, **Mich.**

#### **INTOXICATING LIQUORS**

A defendant may not be subjected to separate sentences for possessing and transporting the same liquor as a single transaction. *Segurola v. United States*, 16 F. (2d) 563.

A conviction of a person charged with the illegal transportation of intoxicating liquor cannot be sustained, in the absence of evidence from which the jury may find beyond a reasonable doubt that the liquor was potable as a beverage. *State v. Unlauf*, 211 N. W. 475, **Minn.**

In prosecution for unlawful possession of intoxicating liquors, where defendant's explanation as to how bottle seized by sheriff came to his hand was not so improbable as to be discredited on that account, and there was no testimony contradicting him, jury did not have right to reject his testimony. *Miller v. State*, 211 N. W. 279, Wis.

#### MOTOR VEHICLES

Pedestrian, injured by stone which flew up from roadway when it was struck by wheel of automobile, in order to recover, must prove accident resulted from automobile driver's negligence. Evidence held insufficient to show that automobile driver's negligence caused accident. *Burkes v. Lieberman*, 218 N. Y. Supp. 593, N. Y.

Occupant of unregistered car on highway cannot recover from town for injuries resulting from insufficiency of highway bridge, though he knew nothing of operator's failure to comply with statute requiring license, since he was not "traveler." *Hanley v. Town of Poultney*, 135 Atl. 713, Vt.

#### MUTUAL BENEFIT INSURANCE

In suit by beneficiary for insurance in which children intervened, by-law of society confining beneficiaries to family of member, held not to divest wife's rights as such on subsequent divorce, as by-law relates only to eligibility at time of issuing policy. *Walden v. McCollum*, 288 S. W. 386, Ark.

#### NEGLIGENCE

Plaintiff, injured by fall on unlighted stairway while leaving lodge hall, held guilty of contributory negligence for failure to go back to lodge room and ascertain where light switch was. *Conboy v. Osage Tribe No. 113*, I. O. R. M., Inc., 135 Atl. 729, Pa.

That dredge at canal bank caused earth to fall and make displacement wave, which raised steamer, and then let it fall and strike submerged pile, held not alone proof of negligence. *W. H. Gahagan, Inc. v. Tucker Stevedoring Co.*, 15 F. (2d) 936, Del.

#### NUISANCES

Private garage in residential neighborhood, consisting of two one-story buildings of 10 stalls each, facing each other, with 14½-foot driveway between, held "nuisance," in view of noise, danger to pedestrians, congestion of traffic, repairing in street, fumes, and depreciated property values. *George v. Goodovich*, 135 Atl. 719, Pa.

Restraining order pending hearing on rule to show cause why preliminary injunction should not issue held warranted by noises caused by keeping and repairing trucks in open space and building between complainants' dwellings, the motors of which truck were tuned up as early as half-past five o'clock in the morning. *Episcopo v. Olivere*, 135 Atl. 482, Del.

#### RAILROADS

Foreign railroad corporation, having no tracks in state, which sold no tickets, issued no bills of lading, nor held any stockholders' or direc-

tors' meetings therein, held not doing business within state, notwithstanding it had agents for soliciting freight and passenger business therein, and had stock transfer agent and deposits in banks in state solely for payment of dividends and interest on mortgage bonds by checks drawn in another state, and it was therefore not subject to service of process within the state. *Fowble v. Chesapeake & O. Ry. Co.*, 16 F. (2d) 504.

#### RELEASE

Where plaintiff testified that after injury she was required to keep her daughter home from work to nurse her, and defendant's claim agent represented that he was reimbursing plaintiff for daughter's lost wages, and said that plaintiff's claim would be taken up later, and stated that paper constituting release was merely a receipt for the money, and plaintiff then called for reading glasses to be brought and they were brought her, but the claim agent said, "You do not need to read it; it is only a receipt," and plaintiff trusted the claim agent and believed him and signed the release without reading it in reliance upon his statement, held, sufficient for jury on issue of fraud in procurement of release. *Fournier v. Holyoke St. Co.*, 154 N. E. 546, Mass.

#### STREET RAILROADS

The construction and maintenance of trolley poles in the center of a street, with the consent of the municipality, may become such an obstruction as to constitute actionable negligence. *Aubin v. Duluth St. Ry. Co.*, 211 N. W. 580, Minn.

#### THEATERS AND SHOWS

Doctrine of *res ipsa loquitur* held inapplicable in action against theater owner to recover for injury to person and clothing of patron, caused by spilling of lemonade on her while she was occupying seat in darkened theater. *Block v. Opera Holding Co.*, 154 N. E. 761, Mass.

#### WORKMEN'S COMPENSATION

That town board told employees, hauling gravel, that they must furnish dynamite, select pit boss, and assume the risk, held not to relieve from liability to pay compensation, where it continued to pay employees directly. *Rouse v. Town of Bird Island*, 211 N. W. 327, Minn.

Freezing of hands from exposure to cold while shoveling coal, which was merely consequence, to which persons in locality, whether so employed or not, were equally exposed, held not to arise "out of employment" so as to be compensable under Workmen's Compensation Act. *Consumers' Co. v. Industrial Commission*, 154 N. E. 423, Ill.

Industrial Commission has no power by rules of procedure to prescribe what particular evidence is necessary to entitle applicant to compensation for injury, under Workmen's Compensation Act, in absence of statute delegating such power. Statute providing that Industrial Commission shall not be bound by common-law or statutory rules of evidence or technical rules of procedure, does not authorize commission to promulgate rules denying compensation because of absence of particular evidence. *Livingston v. Industrial Commission*, 251 Pac. 368, Utah.

## INDEX TO CURRENT LEGAL PERIODICALS

## The Cyc-Corpus Juris Classification is Used Herein

The titles of articles are printed in large capitals, and the author's name is given. The other materials digested are notes or comments on cases or law points, and the principal case discussed is given with the decided point. Case notes that merely state what the opinion held are excluded. Only articles and notes that would be of practical value are included. A classified cumulative index will later be given, so that it will not be necessary to search through each prior number. A cumulative table of cases commented on will be given when it becomes necessary for convenient search.

The references to legal periodicals are by volume and page, except where otherwise indicated. Thus, 39 Harv. L. R. 82-100, refers to volume 39, page 82 of the Harvard Law Review. The length of the article is indicated by the page numbers. Thus, the article referred to is 19 pages long, covering pages 82 to 100, inclusive.

The abbreviations used (other than conventional) are as follows:

Am.—American.

B.—Bulletin.

C. L. J.—Central Law Journal.

J.—Journal.

L.—Law or Legal.

Q.—Quarterly

R.—Review.

Reg.—Register.

Rep.—Reporter.

U.—University.

**AGRICULTURE**

Co-operative Agreements—Rescission—Release of One Member as Rescission of Co-operative Agreement. [Staple Cotton Co-op. Ass'n v. Borodofsky, 108 So. 802, Miss.] 11 Minn. L. R. 276.

**ARMY AND NAVY**

War Risk Policy of Insurance—Designation of Beneficiary as Trustee—Change of Beneficiary. [Ambrose v. United States, 15 F. (2d) 52.] 11 Minn. L. R. 281.

**BANKS AND BANKING**

Account of Customer Credited with Draft Deposited—Reservation of Right to Charge Back if Draft Is Not Collected—Debtor and Creditor Relationship. [Cottondale Planting Co. v. Diehlstadt Bank, 286 S. W. 425, Mo.] 11 Minn. L. R. 272.

**BILLS AND NOTES**

Fraud in the Inception—Negotiability and Real Defenses. [Security Finance Company v. Comini, 249 Pac. 1054, Ore.] 6 Oregon L. R. 160-164.

**CANCELLATION OF INSTRUMENTS**

Necessity of Tender of Consideration Received—Rescission of Contract of Purchase of Interest in Real Estate Business—Provision for Restoration of Consideration in Deed. [Cain v. Norman, 248 Pac. 71, Wash.] 11 Minn. L. R. 277.

**CARRIERS**

Gratuitous Passengers—Stipulation for Non-Liability for Negligence on Free Pass of Caretaker, Invalid. [Miller v. Maine Cent. R. Co., 133 Atl. 907, Me.] 11 Minn. L. R. 273.

**CONFUSION OF GOODS**

Forfeiture the Rule for Fraudulent Confusion—Exception for Goods of Same Nature and Value. [Somers v. Kane, 210 N. W. 287, Minn.] 11 Minn. L. R. 274.

**CONSTITUTIONAL LAW**

Imprisonment for Debt. [In re Oswald, 244 Pac. 940, Cal.] 15 Cal. L. R. 153-156.

President's Power of Removal—Consent of United States Senate. [Myers v. The United States, 47 Sup. Ct. 21.] 6 Oregon L. R. 165-171.

Separation of Powers—Legislative Interference with the Functions of Courts—Invalidity of Statute Forbidding Bank Commissioner to Divulge Information Acquired by Virtue of His Office. [Ex Parte French, 285 S. W. 513, Mo.] 11 Minn. L. R. 276.

**CONTRACTS**

CONDITIONAL DELIVERY OF WRITTEN CONTRACTS. By Arthur L. Corbin. 36 Yale L. J. 443-463.

**CORPORATIONS**

What Law Governs the Transfer of Shares of Stock and Stock Certificates. [In Direction der Disconto-Gesellschaft v. United States Steel Corporation, 45 Sup. Ct. 207.] 15 Cal. L. R. 145-153.

**CRIMINAL LAW**

APPEALS BY THE STATE IN CRIMINAL CASES. By Justin Miller. 36 Yale L. J. 486-512.

Failure to Give Statutory Instruction Where It Is Not Requested as a Ground for Reversible Error. [State v. Edmundson, 249 Pac. 1098, Ore.] 6 Oregon L. R. 176.

**DEEDS**

CONDITIONAL DELIVERY OF WRITTEN CONTRACTS. By Arthur L. Corbin. 36 Yale L. J. 443-463.

Conditional Delivery to the Grantee. [Kimbro v. Kimbro, 249 Pac. 180, Cal.] 15 Cal. L. R. 156-160.

**DIVORCE**

Payment of Alimony Pendente Lite to Guilty Wife. Note.—71 Solicitors' Journal, 92-93.

**ESCROWS**

CONDITIONAL DELIVERY OF WRITTEN CONTRACTS. By Arthur L. Corbin. 36 Yale L. J. 443-463.

**HUSBAND AND WIFE**

Necessaries—Husband's Statutory Liability for Household Supplies Used by the Family. [Rotering v. Hibbard, 210 N. W. 395, Minn.] 11 Minn. L. R. 279.

**INJUNCTIONS**

Right of Taxpayer to Enjoin Illegal Expenditure of State Funds by State Officers—Lack of Interest of Taxpayer. [Asplund v. Hannett, 249 Pac. 1074, N. M.] 11 Minn. L. R. 278.

**INSURANCE**

Statute Providing for Standard Fire Insurance Policy—Validity of Oral Contracts of Insurance. [Salquist v. Oregon Fire Relief Association, 192 Pac. 312, Ore.] 6 Oregon L. R. 172-175.

**INTOXICATING LIQUORS**

The Meaning of the Federal Rule on Evidence Illegally Obtained. Note.—36 Yale L. J. 536-542.

Practice of Permitting Jurors to Smell or Taste Liquor in Evidence Constitutes Reversible Error. [Nix v. City of Andalusia, 109 So. 182, Ala.] 2 Ala. L. J. 53-56.

Search of Automobile on Information Without Warrant—Constitutionality of Statute Directing Such Search. [State v. DeFord, 250 Pac. 220, Ore.] 6 Oregon L. R. 177-183.

Condemnation of Automobiles Used in Transportation of Liquors—Rights of Vendor in Conditional Sales Contract—Reputation of Buyer as Law Violator Must Be General. [Wright Motor Co. v. State, 106 So. 868, Ala.] 2 Ala. L. J. 46.

**JUDGMENTS**

Reciprocity and the Recognition of Foreign Judgments. [Johnston v. Compagnie Generale Transatlantique, 152 N. E. 121, N. Y.; Cowens v. Ticonderoga Pulp & Paper Co. 217 N. Y. Supp. 647.] 36 Yale L. J. 542-549.

**LIFE INSURANCE**

Waiver of Breach of Condition—Knowledge of Soliciting Agent Is Not Knowledge of Insurer. [North Carolina Mutual Life Insurance Company v. Kerley, 109 So. 755, Ala.] 2 Ala. L. J. 48.

**LIMITATIONS OF ACTIONS**

Validity of Contract Limiting Time in Which to Bring Action—Building Contractor's Guaranty Bond—Limitation Must Be Reasonable. [Cook v. Heinbaugh, 210 N. W. 129, Iowa.] 11 Minn. L. R. 282.

**MASTER AND SERVANT**

A Master's Liability for Wrongful Acts of His Servant—Its Wide Extent. Note.—71 Solicitors' Journal, 91-92.

**MOTOR VEHICLES**

Liability of Owner of Automobile for Negligent Use by Servant or Agent—Invitee of Agent. [Garner v. Baker, 108 So. 38, Ala.] 2 Ala. L. J. 51.

**MUNICIPAL CORPORATIONS**

General Zoning Ordinances—Valid Exercise of Police Power. [Village of Euclid, Ohio v. Ambler Realty Co. 47 Sup. Ct. 114.] 11 Minn. L. R. 275.

**NUISANCES**

Operation of Barbecue Stand in Residence Neighborhood Deemed to be a Nuisance Abatable by Injunction. [Deevers v. Lando, 295 S. W. 746, Mo.] 2 Ala. L. J. 52.

**PLEADING**

The Effect of Pleading on Jurisdiction. [New Haven Sand Blast Co. v. Dreisbach, 133 Atl. 99, Conn.] 36 Yale L. J. 549-556.

**PRINCIPAL AND AGENT**

Non-Existent Principal—Liability of Agent When He Purports to Act for a Non-Existent Principal—Contract to Purchase Land by Such Agent Not Enforceable Against Him by Specific Performance. [Weiss v. Baum, 217 N. Y. Supp. 820.] 11 Minn. L. R. 283.

**REMOVAL OF CAUSES**

Right to Remove to Federal Court an Action Begun by an Alien in a State Court Against Resident and Non-Resident Defendants—Alien Not Considered One of "Citizens of Different States." [Pringle v. Storrow, 153 N. E. 26, Mass.] 11 Minn. L. R. 285.

**SEARCHES AND SEIZURES**

The Meaning of the Federal Rule on Evidence Illegally Obtained. Note.—36 Yale L. J. 536-542.

The Effect of an Unconstitutional Search and Seizure Upon a Subsequent Seizure for a Different Purpose. [In the Matter of the Petition of E. L. Morgan, U. S. D. C., N. D. Calif., Div. 1, Nov. 1, 1926.] 75 Univ. of Pa. L. R. 275.

**TRADE UNIONS**

THE LEGALITY OF THE GENERAL STRIKE IN ENGLAND. By A. L. Goodhart. 36 Yale L. J. 464-485.

Peaceful Picketing in New York, 1912-1926. Note.—36 Yale L. J. 557-564.

**WILLS**

Probate of—Statute of Limitations—Five-Year Period. Note.—2 Ala. L. J. 18-27.

Residuary Devise: Vesting of Legacies. [Matter of the Estate of Ogden, 248 Pac. 680, Cal.] 15 Cal. L. R. 170-173.

Proof of Lost or Destroyed Will as Revocation of Earlier Will. [Estate of Bassett, 238 Pac. 666, Cal.] 15 Cal. L. R. 164-169.

Contracts to Devise or Bequeath Enforceable by Specific Performance After Promisor's Death. [Stone v. Burgeson, 109 So. 155, Ala.] 2 Ala. L. J. 56-58.

**WORKMEN'S COMPENSATION**

Defendants—Apportionment of Award Between Surviving Parent and Children—Right of Child to Portion of Award. [Smith v. Hix, 209 N. W. 844, Mich.] 11 Minn. L. R. 288.